SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 860

BROTHERHOOD OF SLEEPING CAR PORTERS,
Petitioner,

v.

FRED THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certioirari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on September 14, 1966.

Opinions Below

The order of the United States District Court for the Eastern District of South Carolina, dated July 12, 1965, and printed in Appendix A hereto, *infra*, p. 12, is reported in 243 F. Supp. 261. The opinion of the Court of Appeals for the Fourth Circuit, printed in Appendix B hereto, *infra*, p. 41, is reported in 63 LRRM 2111, official citation is unavailable. The judgment of the Court of Appeals was entered on September 14, 1966 (Appendix C, *infra*, p. 50).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

I. Whether, where a labor organization is the bargaining agent for all employees, the labor organization can be held liable in damages to one employee for its failure to process a grievance based on that employee's interpretation of the bargaining agreement and work rules in a controversy over seniority between said employee on the one hand, and the employer and other affected employees on the other, where such interpretation runs counter to that adopted by both the employer and the union.

II. Whether, in a suit for "substandard representation" and "malicious discrimination", damages may be awarded for supposed loss of earnings to be incurred subsequent to judgment.

Statement

Respondent came to work for the Atlantic Coast Line Railroad in 1946, as a porter. Porters were of two kinds, mail porters and train porters. Sometime in 1948, Respondent received a promotion to a regular job as train porter, and continued to hold this assignment. Thereafter, his name appeared on the seniority lists for Train Porter and he apparently had no interest in Mail Porter seniority; in any event, he filed no protest.

In 1952, Respondent asked his employer that he be given Mail Porter seniority retroactive to 1948, displacing the other employees who had been accumulating Mail Porter seniority since 1948.

The collective bargaining agreement provided that a protest as to the correctness of any seniority roster be made within sixty days after posting of the roster, or the roster would stand and that the sixty day period would apply only to the year when a change would have been made. Accordingly, the carrier refused Respondent's demand.

Respondent thereafter, for the first time wrote the Petitioner to enlist its help. The Petitioner explained to Respondent that under the agreement nothing could then be done about any claimed 1948 seniority as Mail Porter on account of the lapse of time. It pointed out to him that under the new (1954) bargaining agreement then in the process of being negotiated, Train and Mail Porters would be used interchangeably, and a Mail Porter promoted to Train Porter would retain seniority as Mail Porter. It advised Thompson that if the opportunity arose for him to begin again to accumulate seniority as Mail Porter, it would thus be to his advantage so to do.

Under the accepted practice of the industry, a man holding a regular job in one classification has to "protect" that regular job, and is ineligible to establish seniority in another classification. Thus, Respondent could not, while retaining his regular job as Train Porter, receive seniority on account of extra ("emergency") runs he might make as Mail Porter in addition to his regular job. He would have to give up his regular job and start again, working from the "extra board". Respondent asked the railroad for leave of absence from his regular run, apparently reasoning that he thus could get around the work rule. The carrier refused to grant such leave of absence, and the plan fell through. Respondent continued his regular job as Train Porter. Nothing was said to the Petitioner.

Respondent next approached the Petitioner in 1956, still agitating his claim for seniority as of 1948. The union arranged a conference with the carrier but the railroad refused to jump Respondent over the men who had been accumulating seniority since 1948 and who would be displaced thereby, but it was willing to give Respondent 1948 seniority if the men to be made junior to him so agreed. They refused, and this fell through.

Not being able to get Mail Porter seniority as of 1948, Respondent then informed the Petitioner that he should

have Mail Porter seniority as of 1953. The union arranged a conference with the railroad and Respondent regarding this claim. Once again, the carrier refused to jump him over the employees whose seniority had intervened since Respondent had not filed a protest on the 1954 roster—the runs he made in 1953 were "emergency" runs in that he was protecting a regular job. However, the carrier agreed to establish such seniority for Respondent if the men to be displaced assented. They refused.

The union then asked the railroad if it would agree to give Respondent Mail Porter seniority as of 1956. This would enable him to accumulate Mail Porter seniority, but would not displace anyone. The carrier agreed so to do if Respondent gave up his claims to prior entitlement. The union recommended to Respondent that he do so; he was given Mail Porter seniority as of 1956.

While this would have enabled him to take his share of Mail Porter runs off the "extra board", he instead left the employ of the railroad and brought the present suit. The suit was initiated in the Court of Common Pleas of Florence County, South Carolina, on October 18, 1958 and was removed to the Federal District Court.

Trial was begun before a petit jury on December 11, 1961, and a verdict for the defendant union was directed at the conclusion of plaintiff's case on December 13, 1961. Plaintiff (Respondent) appealed to the Court of Appeals, which on March 25, 1963, reversed the District Court and remanded the cause for a new trial. A second trial was held at the December, 1964, term. The jury returned a verdict for the plaintiff (Respondent) for $56,500 actual damages. Defendant (Petitioner) moved for judgment N.O.V. and, in the alternative, for a new trial. These motions were denied by Order of July 12, 1965. Defendant (Petitioner) appealed to the Court of Appeals, which, on September 14, 1966, affirmed and entered judgment.

Reasons for Granting the Writ

1. The Court of Appeals has decided an important question of Federal law.

The bargaining agent is an integral part of the process set up by the Railway Labor Act for the orderly administration of labor relations throughout the industry. Necessarily, the bargaining agent must determine what it regards as the proper interpretation of bargaining agreements, work rules, etc. It must have an area of discretion in deciding whether an employee has a valid grievance which should be processed to conclusion to the Adjustment Board or whether further agitation would be fruitless. And any court decision which unduly restricts this area of discretion or which penalizes the bargaining agent for its exercise of reasonable discretion decides an important question of federal law.

The decision of the Court of Appeals goes, even farther. It affirms the imposition of liability simply because there is reasonable ground for a jury to have come to a decision as to Respondent's claim different from that at which the bargaining agent arrived.[1]

The Court below erred when it measured the Petitioner's duty to refrain from invidiously discriminating against the Respondent by whether a jury would find that the grievance advanced by the employee was meritorious, despite the view of both the carrier and the union that their interpretation of the collective bargaining agreement was to the contrary. No evidence was introduced to show any conspiracy or collusion between the carrier and union in adopting this interpretation nor was this contention ever advanced by Respondent.

---

[1] "From our reading of the record we also think that it was a jury question whether the union in 1956 should have supported Thompson's claim for seniority as of 1953. . . ." (p. 46)

The decision of a bargaining agent not to process a grievance to final conclusion when such determination is based on a reasonable evaluation of its interpretation of a collective bargaining agreement regarding the operation of a seniority clause cannot be deemed substandard representation or invidious discrimination. The reasonableness of the organization's decision can be judged by the fact that the carrier's interpretation of the contract coincided with that of the union and that there was no collusion or conspiracy between the carrier and the organization in arriving at such interpretation.

Therefore, under the rationale of the Court below, the bargaining agent must make its decision not on the basis of its own judgment, but on the basis of its guess as to what a jury may find. The risk is intolerable; and hence as a practical matter the bargaining agent, for its own protection would have to take every complaint to the Adjustment Board even though the carrier and it agreed on the meaning of the contract and its interpretation called for in the particular situation.

The obvious effect of this upon the Administration of the Railway Labor Act is of the broadest concern.

2. The decision of the Court of Appeals is in conflict with the applicable decisions of this Court.

At the time of the decision of the Court of Appeals upon the first appeal, there seemed to be no question that damages could not be awarded for earnings supposedly to be lost in the future, after final judgment in the case.[2] Upon re-trial, however, the District Court charged that the jury could take into consideration future damages which might be suffered by respondent for the period from the

[2] "He sought actual damages of $10,000 for past losses, plus allowance for such losses as might accrue pending a final determination, as well as punitive damages of $75,000."

date of trial to the date of his anticipated death as determined by the South Carolina mortuary tables. There can be no question that the jury did in fact award damages for future loss of earnings.

Petitioner excepted to this charge and made it one of the grounds for its motion for new trial. The District Court denied the motion.

The Court of Appeals held:

> "We are of the opinion that the District Court did not abuse its discretion in refusing to set aside the jury's verdict. Appellant objects to the allowance of any damages for future losses on the ground that they are too speculative. The propriety of an award for future losses, however, is implicit in the decisions of the Supreme Court in *John Wiley & Sons* v. *Livingston,* 376 U. S. 543 (1964) and *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1956). *Wiley* establishes that seniority rights do not necessarily terminate at the expiration of the collective bargaining agreement. *Lincoln Mills* mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations. Since neither the plaintiff nor the defendant saw fit to make the railroad a party to this action, the only effective remedy is a damage award for the loss of past and future earnings."

Prior to this, it would appear to have been settled that in actions analogous to the one at bar brought under the Railway Labor Act, courts have refused to award damages which might accrue beyond the date of the verdict.

In *Shiels* v. *Baltimore and Ohio Railroad Company,* 154 F. Supp. 917, aff'd 254 F. (2d) 863, cert. den. 358 U. S. 846, cert. den. 258 U. S. 896 (1957), an action was brought under the Railway Labor Act for damages for wrongful discharge wherein it was claimed that the union caused the discharge. The Court discussed the plaintiff's alleged right to continued employment and the applicability of the collec-

tive bargaining agreement to that alleged right. The Court wrote at page 925:

> ". . . Prior to the Union Shop Amendment, at least, it was settled that the Railway Labor Act itself, does not create any term of permanent employment. *Beeler* v. *Chicago R. I. & Pac. Ry. Co.*, 10 Cir., 1948, 169 F. (2d) 557, at page 560 citing *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034, and *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789."
>
> ". . . The Court is not persuaded that Congress intended in the Union Shop Amendment to impose any separate and unique responsibility, such as damages for deprivation of permanent employment, in cases of terminations under, but not justified by, a union shop agreement". (p. 926.)

In the *Shiels* case, *supra,* the plaintiff's claim for lost wages was limited to the date of judgment. It can be seen, therefore, that under the Railway Labor Act there is no right to permanent employment and, therefore, no damages should be allowed based on loss of permanent employment.

In *Walker* v. *Southern Railway Co.,* 237 F. Supp. 278, the United States District Court for the Western District of North Carolina, adopted the holding and rationale of *Shiels,* emphasizing that the plaintiff had no right to claim "lost wages" as damages beyond the date "of the judgment". (p. 281—emphasis in Court's opinion.)

Both the *Shiels* and the *Walker* cases concern themselves with actions predicated on Section 152 of Title 45 of the United States Code Annotated (Railway Labor Act), the very same section on which respondent in the case at bar based his suit.

It must be noted that the holding in the *Shiels* case as to the method of calculating damages was approved by a Court of Appeals, and *certiorari* was denied twice by the United States Supreme Court. Research has shown that

the *Shiels* case which was concerned with a claim for damages under the Railway Labor Act, has been uniformly followed.

Moreover, these holdings and the rationale contained therein, are bottomed on sound logic and meritorious policy considerations.

The reasons for the rule as set forth in *Shiels* and other cases is that any attempt to determine future damages in cases of that nature is speculative, beset by future contingencies which cannot be accounted for, and must be based on conjecture. In order to determine future damages there are a number of unfathomable variables such as (1) the wages which respondent would have earned during the next 26.46 years, if he had the claimed seniority as a mail porter; (2) the wages which he would have earned if he acts as required to mitigate his damages during the same 26.46 year period; (3) whether a collective bargaining agreement covering mail porters would be in effect as to this carrier during all of the same 26.46 years; (4) whether such collective bargaining agreements would be modified in the next 26.46 years so as to alter respondent's seniority rights; (5) and whether through changes in technology and business operations the mail porter job would remain in existence during the same quarter of a century.

Since the claim for future damages is dependent on an argument that respondent will continue to have not only seniority but sufficient seniority so that he will remain continuously employed in the classification of mail porter, notice must be taken of the well established rule of law that seniority is a factor of employment status wholly and solely created by a contract and completely dependent upon the provision of the contract which created the status. *Goodin* v. *Clinchfield Railroad Company,* 125 F. Supp. 441, aff'd 229 F. (2d) 578; cert. den. 351 U. S. 953 (1956); *McMullans* v. *Kansas, O. & G. Railway Company,* 229 F. (2d) 50, cert. den. 351 U. S. 918 (1956); *Giordano* v. *Mack Trucks, Inc.,* 203 F. Supp. 905 (1962).

This is particularly significant in the railroad industry, the industry in which respondent was employed, because collective bargaining agreements there are not written for specific periods of time but either party may seek to terminate or modify on the giving of a Section 6 notice (45 USC Section 152).

Another variable noted above is the changing technology in business operation methods in the railroad industry.

The facts in the record before the Court in this case provide illustration for the general statement. The respondent in this case was a Train Porter for many years yet all Train Porter jobs were abolished in 1956.

The job of Mail Porter is only filled by this carrier through an "extra board" list and not by regular continuous assignment. With the advent of more and more mail sent by plane, and the continuous spread of a practice whereby mail which formerly was transported by train is now being transported by truck, it is evident that a prognosis that the mail porter job will continue for a period of time in excess of 26 years is highly speculative and conjectural. The differences between this type situation and one involving personal injuries where mortality tables are used to calculate future damages, is self-evident. In the latter cases the claiming party, when properly accorded future damages, has proved that his capacity to perform in remunerative labor has been permanently diminished or permanently lost by the nature and permanence of the injury.

CONCLUSION

For the foregoing reasons, and in furtherance of the orderly administration of the Railway Labor Act, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

(Order of District Court)

UNITED STATES DISTRICT COURT

E. D. SOUTH CAROLINA

FLORENCE DIVISION

July 12, 1965

FRED THOMPSON,

Plaintiff,

against

BROTHERHOOD OF SLEEPING CAR PORTERS, an Unincorporated Railroad Labor Organization, National in Scope,

Defendant.

HEMPHILL, *Chief Judge.*

Heard by the Court, with a jury, at the December, 1964 Term of Civil Court for the Florence Division, United States Courts for the Eastern District of South Carolina. Plaintiff claims that the acts of defendant Brotherhood caused him to lose his seniority as a Mail Porter, with resulting deprivation of his rightful tours of duty and opportunities for employment with the ACL Railroad. He sought actual damages for past losses, plus allowance for such losses as might accrue pending a final determination, punitive damages, and future losses. Trial resulted in a verdict for plaintiff for Fifty Six Thousand Five Hundred Dollars actual damages.

In due time defendant offered appropriate motion, to wit:

Now comes the defendant and moves to have the verdict in the cause and judgment entered thereon set aside, and to have judgment entered in favor of the defendant in accordance with its motion for directed verdict.

In the alternative, defendant moves the Court for a new trial upon the following grounds:

(a) That the verdict was contrary to the weight of the evidence.

(b) That the Court erred in refusing defendant's Requests to Charge numbers four (4), five (5), six (6), and eight (8).

(c) That the Court erred in charging the jury that, in determining damages, they should take into consideration possible future loss of earnings.

(d) That the amount of the verdict is excessive, and rests upon speculation and conjecture.

Hearing on the motion was postponed to convenience counsel in obtaining and studying the trial transcript.

Initiated October 18, 1964 in the Court of Common Pleas for Florence County, South Carolina, removal procedures engaged the jurisdiction of this forum. Thereafter, in December of 1961 trial was begun before a jury at Florence; at the conclusion of plaintiff's case a motion by defendant for involuntary dismissal (directed verdict) was granted.

Upon appeal the case was "Reversed and remanded for a new trial in accordance with the opinion of this court." From that opinion, this Court finds its direction:

In the present case, it appears necessary to pursue only one line of inquiry to resolve the questions of "invidious discrimination," "reasonableness," "good faith and honesty": Did the plaintiff show that he received different or substantially sub-stand-

ard representation at the hands of the Brotherhood? If so, was it because of some improper reason, such as his unsatisfactory union status? Did this treatment cause him injury? If the answers of the trier of the fact to the three questions are in the affirmative, the plaintiff is entitled to relief.

WAS THE VERDICT CONTRARY TO THE WEIGHT OF THE EVIDENCE?

Defendant strongly avers that there is no evidence in the record to support the jury's verdict. In response, let us excerpt from that record.

Introduced into evidence and published was this letter:

Mr. Fred N. Thompson
310 B. So. Ravenel Street
Florence, South Carolina

My Dear Brother Thompson:

I have your letter of May 3, 1956 and have carefully noted the contents, I am sure you were aware that there was nothing I could do until you became a fully fledged member; now that you have followed through on your responsibility, rest assured that we will do the same at this end. I have instructed your local chairman to request a formal hearing on your case. I trust that you will cooperate in every way possible to get this case started in order that we may be able to process it into the Railroad.

I have written to Brother Smith and expect that he will be in touch with you. I regret the delay in answering you but I have been involved in a major promotion of a Civil Rights Rally to be held in Madison Square Garden May 24th.

It is my hope that this matter can be brought to a speedy conclusion. I am returning herewith the letter from Mr. Faulkner.

Fraternally yours,

/s/ B. F. McLaurin
B. F. McLaurin
Internal Field Organizer.

BFM

It is revealing to note as well another letter from Mr. McLaurin, dated November 23, 1954, addressed to all train porters, under defendant's letterhead, which stated:

> It is a well-known fact that porters are off their jobs today who ordinarily would be working if they had been members in good standing in the organization.

The record is replete with testimony of the plaintiff as to how the defendant Union did not fulfill its obligation under the Act, and the Union appropriately attempted to refute. The issues were properly left to the jury.

The Court would be remiss if it did not outline a portion of the record which characterized the "aura" around the defendant Union which was being charged with a breach of its statutory duty by plaintiff.

A past officer in the local Union was being examined. The colloquy was as follows:

> Court: Do you collect the dues?
> Witness: No, sir.
> Court: Who collects them?
> Witness: Secretary-treasurer.
> Court: Well, if you had been elected secretary-treasurer instead of local chairman, would you have collected the dues?

Witness: Yes, sir.

Court: Where would you collect them?

Witness: At our meetings. We have meetings different places.

Court: In South Carolina?

Witness: Yes, sir.

Court: Where would the dues be sent?

Witness: Richmond, Virginia.

Court: To whom?

Witness: George McNair.

Court: Who is he?

Witness: He is the general secretary-treasurer, Local No. 6.

Court: Local No. 6?

Witness: Yes, sir.

Court: Did the dues go to the Brotherhood?

Witness: That is as far as we send them. They send it on to the Brotherhood.

Court: How much of your dues go to the Brotherhood?

Witness: I don't know. We keep a quarter out of the dollar out of every man's dues and I think the general chairman keeps a dollar.

Court: How much are the dues?

Witness: Five dollars.

Court: A month?

Witness: Yes, sir.

Court: You pay five dollars a month and the local here keeps a quarter?

Witness: Yes, sir.

Court: Who do you say gets a dollar?

Witness: General chairman.

Court: Where does he hang out?

Witness: He is in Richmond and he runs here too.

Court: How much goes to the national Brotherhood?

Witness: It ought to be about $3.75.

Court: What do you get for your dues that you send to the national Brotherhood?

Witness: What did I get for it, sir?

Court: Yes, sir.

Witness: I get a receipt for it.

Court: What else do you get?

Witness: That is all I get. The general chairman gets all the rest.

Court: What is his salary?

Witness: I don't know, sir, I never asked him.

Court: What do you get for the money you send to the Brotherhood?

Witness: Twenty five cents out of—

Court: Twenty five cents out of five dollars?

Witness: Yes, sir.

Court: What else do you get?

Witness: That is all.

Court: That is all you get?

Witness: Yes, sir.

This Court does not suggest that this evidence is superior or controlling, but the jury had the right, the duty to consider whether, dues or no dues, the Brotherhood, as the recognized representative bargaining agent, performed, or neglected, its duty. As was said in the Circuit Court opinion:

> But, any discrimination in treatment must be based upon relevant, non-invidious distinctions for, while "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, [it is] subject always

to complete good faith and honesty of purpose in the exercise of its discretion."

The record shows repeated efforts of plaintiff to obtain relief, protection of his job. What impact the jury gave to the reasoning that defendant *knew* of his complaint, and did not act in good faith, this Court will not interpret; evidently the jury believed plaintiff had a right to recover.

Various exhibits, correspondence, are in the record. The jury was strongly charged on the burden of proof. This Court now refuses to interpret the proof, as this part of defendant's motion seeks.

[1] Sufficient evidence was presented upon which the jury could so weigh the evidence as to warrant a verdict for plaintiff. The Court will not set aside.

REQUESTS TO CHARGE

Refused Request No. 4 was:

> I charge you that in order for Thompson to recover, he must first prove that there was merit in his claim to mail porter seniority. If he was in fact not entitled to it, then he cannot complain because he was not given it; and whether the Brotherhood "represented" him fairly or unfairly in his claim is immaterial.
>
> As to Thompson's claim to be placed on the Mail Porters' Seniority Roster as of 1948, I charge you that if you find he failed to protest the 1949 roster within sixty days after January 1, 1949, he lost forever his right to 1948 seniority as a Mail Porter.
>
> As to Thompson's claim to be placed on the Mail Porters' Seniority Roster for 1953, on account of Mail Porters runs in 1953, I charge you that if

Thompson were protecting a regular run as train porter—that is, had a regular job as train porter, the railroad could require that he protect his regular run as train porter, and that he was therefore not eligible at the same time to acquire Mail Porters seniority for occasional mail porter runs made while he held a regular job as Train Porter.

The Court charged: (included in the above)

As to Thompson's claim to be placed on the Mail Porters' Seniority Roster as of 1948, I charge you that if you find he failed to protest the 1949 roster within sixty days after January 1, 1949, he lost forever his right to 1948 seniority as a Mail Porter.

Portions refused were refused because either included in the General Charge or were a charge on the facts:

Request No. 5 was:

I charge you further that if you find that Thompson was entitled to be placed on the Mail Porters' Seniority Roster prior to 1956, it does not therefore follow that he has proven his case against the Brotherhood. For he must then prove that the Brotherhood failed to represent him in his claim in the manner required under the Federal Railway Labor Act (45 U.S.C.A., Sec. 152). As to this, I charge you that:

In order to establish a breach by the Brotherhood of its duty to represent Fred Thompson fairly, as the bargaining representative of the porters subject to the bargaining agreement, it is not enough to prove that the Brotherhood was wrong when it agreed with the railroad's interpretation of the contract so that Thompson was not placed on the Mail Porters' Roster prior to 1956. The duty of the Brotherhood was no more than to forbear from hostile discrimination against him. It is not enough to show that it acted arbitrarily; Thompson must prove that the

> arbitrariness was of the bad faith kind; something akin to actual malice is required. It is not a violation of the Federal law under which Thompson is suing that the Brotherhood failed to satisfy Thompson or that it improperly balanced the rights of Thompson and the other porters it represents. Cunningham v. Erie Ry., 266 F.2d 411, 417 (2nd Cir. 1959).

This was refused as written. This Court instead used the language of the Fourth Circuit Court of Appeals. In addition, the matters were treated in the General Charge.

Refused Request No. 6 was:

> I charge you that "fair representation" does not require that the Brotherhood agitate endlessly at the instance of any employee who may consider himself aggrieved. The Brotherhood has a wide range of discretion within which to decide whether or how far a particular claim warrants prosecution. If it concludes that a particular claim has been carried as far as the merits of the claim warrant, and acts in good faith in so concluding, then it is not liable for closing the claim even though you may conclude that the Brotherhood was in fact incorrect.
>
> I therefore charge you that if the Brotherhood was acting in good faith in concluding that the collective bargaining agreement relating to seniority did not require the Railroad to put Thompson on the Mail Porters' Seniority Roster with a seniority date earlier than 1956, you shall find for the defendant.

The content was covered in the General Charge.

Refused Request No. 8 was:

> I charge you that if you find that Fred Thompson was entitled to Mail Porter Seniority prior to October

22, 1956, and if you find further that the Brotherhood did not represent him fairly in his claim, as the term "fairly" has been previously defined by me, then you should award such damages as he has proved he has sustained to this date. The measure of damages is the amount of wages he would have earned as a Mail Porter from the date his job as Train Porter terminated to the present date, minus such money as he received during this period by reason of wages earned elsewhere and unemployment benefits under the Railway Retirement Act.

In this connection, I charge you that it was his duty to minimize damages by diligently seeking employment within his capabilities, and his failure so to do would require you to further diminish his damages by the amount he would have earned had he sought such employment.

This was refused because the Court charged on future loss of earnings (see (c) of motion for judgment N.O.V.).

THE QUESTION OF FUTURE DAMAGES:

The jury was charged, on damages, as follows:

Now, in that connection: If the plaintiff has satisfied you in that he has a just claim and that he has been wronged; as I have charged you, then the next question would be what damages would he receive. The only question of damages in this case is a question of what is known as actual damages and actual damages are compensatory damages. That is what he lost or what he suffered.

The Complaint in this particular case says that he suffered damages because: Paragraph 11 says and the defendant denies:

"That when plaintiff was regularly employed with the Railroad his wages averaged in excess of Three Hundred ($300.00) Dollars per month. That since that time, plaintiff has been almost totally unemployed and has lost certain property." He says that by virtue of this he has lost money—been injured in the sum of—damaged in the sum of $200,000.00; so in no event could you find no more than $200,000.00 in this particular case. That is the maximum.

Now, the plaintiff in this case has proven that he is 43 years of age; having been born, as I recollect it was stipulated, April 8, 1921.

I charge you, as a matter of law in this case, if you, Ladies and Gentlemen of the Jury; If you find a find he has been damaged you are not only entitled to consider what damages he has already suffered but if he has proven it, if he has proven he has suffered any damage, to consider any damages he will suffer in the future. In that connection, I charge you. Ladies and Gentlemen of the Jury; If you find a breach of defendant's duties which the law imposes upon the defendant that the right to recover damages accrues upon the breach. If they have failed to represent him as they should in the manner I have charged you, that would give him a right to recover damages.

The rule of damages in such a case, is what would it come to him, had there not been a breach less whatever he might earn by the exercise by reasonable and proper diligence on his part and, of course, in determining this you can look to a time after the breach and further you can look to a time after the bringing of the law suit; the latter is called future damages. In that connection, I charge you, that any person suffering injury is under a duty to mitigate.

If a man has some injury and yet it causes him a loss, if he can cut down on that loss: In this case, if he can earn money it is his duty to earn as much as he can to mitigate any loss he suffered, if he suffered any loss.

If you find that the plaintiff is entitled to recover, there is objection to the recovery, that the damages are difficult to ascertain because they depend upon conditions and uncertain events. The fact that damages are uncertain and difficult to ascertain is not regarded as sufficient reason for denying all relief.

You must remember, of course, you are not permitted to speculate but must make your decision in accordance with the evidence before you and if you consider future damages in this case: I charge you, that we have in evidence and the Court takes judicial notice, only for the purpose of charging you, what the South Carolina recognition is. It is what is known as a mortuary table which gives the life expectancy of a man. The life expectancy of a man age 43 is 29.54 years, if you find a man is entitled to future damages.

Now, Mr. Foreman and Ladies and Gentlemen of the Jury: I have charged you rather fully and more lengthy than I cared to charge you but that is my duty. Thank you for your patience with me. And you, as Jurors, know that all twelve must agree on a verdict. When you have reached a verdict you record that verdict in one or two forms.

Chief Judge Sobeloff's opinion [2] stated: "Thompson's theory posits a federal right, and therefore federal rather than state law governs." Cited in support of this declaration was the famous Lincoln Mills of Alabama v. Textile

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[2] See Note 1 supra.

Workers Union of America case, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. The Lincoln Mills case and subsequent cases (International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67; Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580) have enjoined courts henceforth in labor relations cases to evolve a "comprehensive," "uniform" body of federal substantive law, applying and incorporating state rules of law only where it is helpful and appropriate.

[2] A crucial issue to be determined on this question involves a body of law that has evolved and developed in this century. With labor unions came collective bargaining agreements, seniority, and federal statutes. Seniority rights basically are contract rights and flow from the collective bargaining agreement between the Union and the Company.

Plaintiff in support of his claim asserts:

1. The agreement can provide that upon the happening of certain contingencies, rights, e.g., seniority, can extend beyond the term of the contract from which they stem.

2. Certain rights, such as vacation pay, retirement benefits, severance pay, seniority, etc., can become "vested" and extend prospectively into the future and beyond the term of the particular contract from which they arise.

3. The earlier rule that seniority rights are to be narrowly construed with damages being limited to the term of the agreement or date of trial has been overruled or modified by the latest federal decisions so that a plaintiff's remedy may now include the *en futuro* aspect of seniority rights.

4. The Lincoln Mills case, supra, enjoins the courts to make these rights in this field subject to a

uniform and comprehensive body of federal substantive law.

5. The agreement between the Brotherhood of Sleeping Car Porters and the ACL specifically provided that "seniority * * * shall begin as of the date of employment * * * and *shall terminate on the last date of the calendar month in which the employee attains the age of 70.* * * * and when that occurs, the *provisions of this agreement* * * * shall automatically terminate as to each employee so retired." [Emphasis supplied.]

6. The agreement can provide for rights to extend beyond the term of the agreement upon the happening of a contingency occurring during the term of the agreement, and when that contingency occurs during the term of the agreement, the rights "vest" and extend prospectively beyond the term of the agreement and can be enforced and protected thereafter.

7. Where there has been malicious interference with contractual relations (employment) substantial damages may be awarded even where the contract of employment is one terminable at will.

The old rule (holding seniority cannot extend beyond the term of the agreement) was enunciated in Elder v. New York Central R. Co., 152 F.2d 361, 364 (6th Cir. 1945); System Federation No. 59 of Railways Employees Department of American Federation of Labor v. Louisiana & A.R. Co., 119 F.2d 509, 515 (5th Cir. 1941); McMullans v. Kansas, Oklahoma & Gulf Ry. Co., 229 F.2d 50 (10th Cir. 1956), Colbert v. Brotherhood of R. R. Trainmen, 206 F.2d 9 (9th Cir. 1953); and Shiels v. Baltimore and Ohio Ry. Co., 154 F. Supp. 917 (S.D. Ind. 1957) which last case was specifically

relied upon by counsel for defendant as being controlling here). The more modern rule recognizing the "future" aspects of seniority is developed in Zdanok v. Glidden Co., 288 F.2d 99, 99 A.L.R.2d 965, (2d Cir. 1961), aff'd 370 U.S. 530, 82 S.Ct. 1458, 8 L.Ed. 671; Giordano v. Mack Trucks, Inc., 203 F.Supp. 905 (D. N.J. 1962); Piano and Musical Instrument Workers Union Local 2549 v. W. W. Kimball Co., 221 F. Supp. 461 (N.D. Ill. 1963); and United Shoe Workers v. Brooks Shoe Manufacturing Co., 187 F. Supp. 509 (E.D.Pa. 1960).

[3] Soon after the Zdanok decision was handed down, it was recognized as "certain to be a landmark in the development of the new federal law." Frances V. Lowden, Jr., writing in 48 Virginia Law Review, 291, *Survival of Seniority Rights Under Collective Agreements: Zdanok* v. *Glidden Co.*, stressed the landmark significance of the holding in light of the Supreme Court's instructions in the Lincoln Mill case to formulate a new federal law of labor contracts. The author acknowledged that "despite the fact that the decision in Glidden contains inconsistencies and ambiguities, as indicated, it is, for the moment at least being cited and followed for the proposition that *under the new federal law seniority survives the contract.*"

[4] In another law review article, *An Industrial Change: Zdanok* v. *Glidden Co.*, 47 Minn. 521, the author Alfred W. Blumrosen, states that "In summary, if the collective contract contains a promise to re-employ in order of seniority *after* the contract's 'terminal date,' *the promise is enforceable according to its terms* on behalf of an employee laid off *during* the contract period. It cannot be enforced by an employee laid off after the collective contract expired, but he may be able to establish that *terms of the collective contract carried over into his individual contract and thus indirectly enforce it.*" [Emphasis supplied.]

This Court is again mindful of the language of the Fourth Circuit Court opinion:

> At such new trial, the plaintiff should be permitted, as he requested in the District Court, to amend his complaint to plead 1953, 1955, or any other appropriate year as to which he can allege, in good faith, that had the Brotherhood acted with sufficient regard for his rights he would have been entitled and able to secure seniority as a Mail Porter.

The opinion, of course, does not say whether the writer had in mind Zdanok when it so ruled, but once the deprivation was a *fait accompli*, how long the consequences might flow was for the jury to consider.

The wisdom of the Zdanok decision lies in its synthesis of the contract and status considerations. The decision protects employer rights to transfer subject to such contractural limitations as may be agreed to by the immediate parties. By placing the burden of limitation on those who would negate seniority rights, the Court has provided some small measure of protection for the worker caught up in the process of industrial change.

Following in the wake of Zdanok v. Glidden is Piano and Musical Instrument Workers Union v. Kimball, 221 F. Supp. 461, supra, which held:

> As in the case of pension rights and retirement benefits, seniority rights extend into the future. Are these rights, which are often referred to as 'vested rights' (though perhaps improperly so), and which arise out of the terms of a union agreement to be honored only so long as the whole of the agreement is enforceable? [Are these rights to be held unenforceable?] Are these rights to be held for naught

thereafter? Zdanok v. Glidden Company, 2 Cir., 288 F. 2d 99, answers these questions in the negative.

In Oddie v. Ross Gear and Tool Co., 195 F. Supp. 826 (E. D. Mich. 1961), the Court stated:

> The issue here is, do seniority rights survive by analogy as an earned right? In Zdanok v. Glidden Co., 2 Cir., 288 F. 2d 99, 103, seniority is called a 'vested' right or one 'earned', as a type of unemployment insurance 'earned', and acquired, by continuous service. * * * We must then return to the contract to determine whether the seniority rights and benefits of the plaintiff are in jeopardy. This Court feels bound by the Glidden case, supra, and its reasoning, and since there is nothing within the contract now in force to the contrary, these seniority rights are to continue.

This case was reversed on appeal, the appellate court holding that on the facts the lower court ruling was distinguishable from the Zdanok v. Glidden facts.

United Shoe Workers v. Brooks Shoe Manufacturing Co., 187 F. Supp. 509 (E. D. Pa. 1960) plaintiff union sought damages against the defendant Brooks for breach of its collective bargaining agreement. The Court's decision in this case was significant in three respects: (1) It awarded compensatory damages for a period *beyond* the term of the collective bargaining contract in effect; (2) It awarded punitive damages for breach of contract on the theory that the contract violation was also an "unfair labor practice" and (3) It evinced dissatisfaction with the somewhat sterile and time honored remedies employed by the National Labor Relations Board in handling "runaway" shops as an unfair labor practice.

The Court first considered $4,251.00 representing the loss in union dues from the date of the shutdown of the Philadelphia plant to the time of trial. The defendant

contended that past dues lost should be calculated only for the shorter period during the effective term of the collective bargaining contract.

This argument was rejected on the theory that the twenty year history of collective bargaining between the parties made it reasonable to assume that another contract would have been negotiated. Second, relying on the twenty year history of collective bargaining and on the pattern of modern labor-management relations, the Court projected the twenty year figure into the future and calculated future loss of union dues at $23,760.00. The damages awarded in this regard were calculated specifically on the basis of loss of future dues extending beyond the term of the agreement in effect.

The Supreme Court has within the past year had occasion to affirm the precise principle and concept imbedded in the Zdanok case. In John Wiley & Sons Inc. v. Livingston, 376 U. S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898, it affirmed that rights, such as seniority, severance pay, etc., can survive the term of the contract from which they derive. The synopsis of the case from the U. S. Supreme Court Reports, Lawyers' Edition, is given in full:

> A labor union entered into a collective bargaining agreement with a corporate employer. During the term of the contract, which did not contain an express provision making it binding on successors of the employer, the employer merged with another larger corporation, none of whose employees were represented by a union. Most of the employees of the corporation so merged were transferred to the plant of the successor corporation. The present action was instituted in the District Court for the Southern District of New York by the union to compel the successor corporation to arbitrate under the bargaining agreement disputes as to the effect

of the merger on the bargaining agreement and on the rights under it of those covered employees hired by the successor corporation. The District Court refused relief ([Livingston v. John Wiley & Sons Inc., D. C.] 203 F. Supp. 171), but the Court of Appeals reversed and directed arbitration ([Livingston v. John Wiley & Sons Inc., 2 Cir.], 313 F. 2d 52).

On certiorari, the United States Supreme Court affirmed the judgment of the Court of Appeals. In an opinion by Harlan, J., expressing the unanimous views of the Court—Goldberg, J., not participating—it was held that (1) the arbitration provisions of the agreement survived so as to be operative against the successor corporation; (2) the demands of the union, embracing post-merger claims and claims relating to a period beyond the terms of the agreement, were not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable; and (3) the arbitrator, not the court, was the appropriate body to decide whether procedural prerequisites conditioning, under the agreement, the duty to arbitrate had been met.

As regards the survival of rights beyond the term of the agreement, Justice Harlan, writing the opinion for a unanimous court, stated at pages 554-555, 84 S.Ct. at page 917:

> It is true that the Union has framed its issues to claim rights not only 'now'—after the merger but during the term of the agreement—but also after the agreement expired by its terms. Claimed rights during the term of the agreement, at least, are unquestionably within the arbitration clause; we do not understand Wiley to urge that the Union's

> claims to all such rights have become moot by reason of the expiration of the agreement. As to claimed rights 'after January 30, 1962,' it is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement. We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement *and their realization after the agreement had expired.*

The Second Circuit Court of Appeals, which decided the original Zdanok v. Glidden case, in 327 F.2d 944 (1964), had occasion to review the propriety of its earlier decision in the light of the extensive impact its decision had in the field of labor law in regard to the extension of seniority rights beyond the term of particular contracts. The court referred to the fact that the employer cited the same cases it had relied on earlier, including the Elder case and related cases, cases which were also cited by the dissent in the original Zdanok decision as the basis of the dissent, and it noted that "great amount of critical discussion in the law reviews that our decision has engendered," citing in a footnote seven law review articles, seven law notes, and three published panel discussions—but adhered to its earlier decision.

Recent decisions reflect the new concepts recognizing the new realities of steadily evolving labor law. In John Wiley & Sons Inc. v. Livingston, supra, Justice Harlan adverted to some of these distinctions: "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary

contract. * * * [I]t is a generalized code to govern * * * the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." 376 U.S. at 550, 84 S.Ct. at 914.

Seniority is based on contract—it must be construed by reference to the contract which creates it. The agreement here said:

> Seniority * * * shall begin as of the date of employment * * * and shall terminate on the last date of the calendar month in which the employee attains the age of 70 * * * and when that occurs, the provisions *of this agreement* * * * shall automatically terminate as to each employee to retire. * * *

In Piercy v. Louisville & N. R. Co., 198 Ky. 477, 248 S.W. 1042, 33 A.L.R. 326, the court said:

> These seniority rights provided for in interdivisional service are provided for in such an ambiguous, uncertain, and remote manner that we must be driven to a well-known rule of interpretation in ascertaining what was meant thereby. That rule is that, when the language of a contract is so remote, uncertain, and ambiguous as that its meaning may not be readily discerned, the courts, in interpreting it, will give to it such meaning as the parties themselves have given to it in operating or acting under it, and we may, without exaggeration, say there is, in interpreting such ambiguous writings, no safer rule for the courts to follow.

In the case at bar there is no ambiguity in the language of the agreement on the matter of seniority. The agreement states one fundamental contingency regarding the vesting of seniority—that he enter the service of the company by employment. Rule 15 states once an employee

has been in the service for 60 days he cannot be disciplined or dismissed without a hearing, etc.

Rule 14 is the only statement in the agreement on how seniority can be lost or terminated other than by retirement at age 70. It states that "when an employee leaves the service of the company of his own accord, he forfeits all seniority rights. If discharged, he forfeits all rights previously held unless reinstated within 90 days, or his case is pendng on appeal as per Rule 15."

In Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 18 L.Ed. 752, the Supreme Court stated a rule for damages that is applicable here:

> The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the same situation he would have occupied if the wrong had not been committed.

To be applied is this general rule of damages, the rationale of the latest Federal decisions specifically holding that seniority rights can survive the term of the agreement, and the specific provision in the agreement in this case that seniority "shall begin" with employment and "terminate" at age 70 to the charge by the court:

> "Rule 4(a) Seniority of each employee shall begin as of the date of employment in his respective classification, and shall terminate on the last date of the calendar month in which the employee attains the age of 70." Mr. Nettles, did you mean to deny that?
>
> Mr. Nettles: Not the entire provision but the applicability of the reduction in forces.
>
> Court: All right, sir. While they don't deny that these exist, they deny that they are applicable to this particular case.

Employees shall be retired from the service of the company on the last day of the calendar month in which they attain the age of 70, or on October 1, 1954, whichever is later, and when that occurs, the provisions of this agreement, other than that providing for retirement at he age of 70, shall automatically terminate as to each employee so retired. * * * "

It is significant that the agreement specifically provides under Rule 4(a) that employees shall be retired from the service of the company on the last day of the calendar month in which they attain the age of 70, or on October 1, 1954, whichever is later, and when that occurs, (not, *if* that occurs), the provisions of this agreement shall automatically terminate. Note these things: That the parties to the agreement are bargaining for all of the porters in the whole system; the particular clause when implemented will force some members of the craft over 70 to retire on October 1, 1954, which for those affected will be the end of their career. Note that this clause was obviously considered with minute particularity as a specific date was agreed upon. Note, too, that this clause follows immediately after the first and fundamental statement of when seniority specifically shall begin and when it shall end. The agreement speaks in plain English of seniority ending on *one of two particular dates*—exact dates down to the precise day of the month—either October 1, 1954, or the last day of the calendar month in which each employee attains the age of 70. Under the terms of this agreement, every single porter on the entire ACL system can mark down on the calendar the precise day he will make his last run—October 1, 1954, or the last day of the month when he reaches 70. Fred Thompson was born on April 8, 1921, and giving an accepted, common sense meaning to the

terms of the agreement he was working under he could know that, absent dismissal for cause, disability, or death, he would make his last run on April 30, 1991.

[5] Then what is the only operative contingency that must be satisfied under this agreement before job security—seniority—attaches: be employed by the company as a porter, make a run in the particular category, survive an unprotected 60 day period, and have his application approved (Rule 15). All of these precedent contingencies or conditions were satisfied by the plaintiff and he thereupon became entitled to the stipulated and bargained for benefits of the senority provision. There is nothing in any of the earlier cases that even by way of dicta denies the authority of parties to an agreement to provide for certain rights to extend beyond the term of the agreement from which they derive. In fact, the courts that followed the old rule more often than not spoke regretfully of the fact that the parties had not so covenanted and that the plaintiff was unable to point to any such saving provision as appears here.

The Court feels that the damages are dependent on a denial, or deprivation of rights; that the damages, or so much as are not mitigated or potential to mitigation, could, if so found by the jury, follow the deprivation into the future. The denial of the motion for a new trial on this ground is based on the specific provisions of the agreement in this case, the surrounding facts and testimony, and the decisions hereinabove referred to.

Is the Amount of the Verdict Excessive?

It is time that the courts became available as a rational forum to give protection to the individual worker in those situations where he stands through no fault of his own outside of the protective concern of his only protector in the field of labor relations—the union. If the union won't help

him, and if management doesn't care to antagonize the union, only the courts can grant relief. And what is to be the measure of that relief under such circumstances—damages for loss of a whole career limited to the annual or biannual period of indefinite period or to date of trial? The answers are so compelling that it seems unnecessary to even pose the questions. Here the amount of damages to date of trial—eight years—is substantial in itself, but it is not just eight years being decided upon.[3]

The Court considers whether there is any other conceivable alternative to that assumption. Assume the agreement is terminated after notice as provided by the Railway Labor Act. Would the railroad dare—or even contemplate discharging or firing any employee or employees not, as they might then contend, protected by any effective agreement? There could be an immediate strike, not only by the employees in that particular craft but by every other employee on every other railroad in the country, because the other crafts would realize that without a united front by all, no man's or group's job would be secure. In fact, in NLRB v. Waterman S. S. Co., 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704, the Supreme Court held that the NLRB has authority to forbid a wholesale discharge of employees, whose tenure is determinable at will, if the discharge is undertaken to effect a purpose forbidden by the Labor Act.

Would the members themselves abandon established senority priorities even if the company would cooperate? The simple fact of considering whether or not there is any possibility of any significant change in the railroad senority system, only serves to reinforce the inference that seniority to a railroad man is permanent; it is his whole life; it has always been the life of railroad men in his lifetime; it is something that he has earned through long years of wait-

[3] Circumstances entirely beyond the control of the courts had bearing on the delay.

ing his turn when waiting his turn meant virtual unemployment, or at best, irregular employment.

The Brooks case awarding damages for loss of union dues 20 years into the future is an example of how the law of damages like all other categories of our law adapts itself to new conditions—to realities.

As the Supreme Court stated in Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265, 266, 66 S.Ct. 574, 580, 90 L. Ed. 652:

> 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights.

In the instant case a fairly secure yardstick for measuring the damages was available; there was an eight year period in which fluctuations would tend to average out, and because of the nature of the case, the wage records for the entire period of the man or men "who took the plaintiff's place" was available. In Bigelow, supra, the court sustained a verdict for damages where the case had been submitted to the jury on two theories: "We conclude that there was evidence to support a verdict for damages on at least one theory on which the case was submitted to the jury." In that regard, if the jury's verdict in this case were construed to be based on the theory of malicious interference with a contractual (employment) relation, the fact that the employment might have been terminable at will would be no bar to the jury awarding substantial damages.

In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 378, 379, 47 S.Ct. 400, 71 L.Ed. 684, the Supreme Court reaffirmed the general rule as to measure of damages, including the elements to be considered in charging a jury as to future damages where loss of future

profits were involved. The test was whether there was "a reasonable basis of computation."

> As to this question the Court of Appeals—after stating that in its opinion the plaintiff's evidence would have supported a much larger verdict than that returned by the jury—said: "The plaintiff had an established business, and the future profits could be shown by past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. (Citing cases.)
>
> We conclude that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent, and that it sufficienly showed the extent of damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference. And the question as to the amount of the plaintiff's damages having been prop-

erly submitted to the jury, its determination as to this matter is conclusive.

If the admonition of Lincoln Mills require the courts to look first to a comprehensive, uniform federal law in fashioning remedies in the labor relations field, it also permits the courts to look to state law if federal decisions on the point be lacking:

> The range of judicial inventiveness will be determined by the nature of the problem. * * * Federal interpretation of the federal law will govern, not state law. * * * But state law, if compatible with the purpose of § 301 [and, now, the Railway Labor Act under the holdings of International Association of Machinists v. Central Airlines, Inc., and Republic Steel Corp. v. Maddox cited infra], may be resorted to in order to find the rule that will best effectuate the federal policy. * * * Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights. [353 U.S. at 457, 77 S. Ct. at 918.]

In this regard, see Martin v. Southern Railway Co., 244 S.C. 315, 136 S.E.2d 907, which involved a wrongful discharge suit by a 62-year-old conductor against the railroad. One of the issues was the contention of the railroad that "[T]he plaintiff's contract of employment was one of indefinite duration terminable at the will of either party and, therefore, plaintiff's discharge afforded no legal basis for complaint." The S. C. Supreme Court held in 136 S.E.2d at 909 that:

> While the term of service of the plaintiff was in some respects indefinite, the agreement between the defendant and the Order of Railway Conductors and Brakemen had the effect of limiting the indefiniteness of the term and the right of the defendant to dis-

> charge the plaintiff, with or without cause, by providing, in effect, that the defendant could not discharge an employee without cause, and that it could not discharge one with cause until it had complied with the provisions of the contract * * *.

[6] The plaintiff in this case testified that his gross—1957-58—earnings, exclusive of unemployment compensation, were $500.00. His earnings during 1959, 1960 and through September 29th, 1961, at $40.00 per week from Aiken and Company were $5,720.00. His earnings from September 29, 1961 through December 1, 1964 were $7,523.00. His total earnings from January 1957 to December 1964 were $13,743.00. The earnings of R. A. Anderson, the porter with comparable seniority, for the period starting with the year 1957 through October 31, 1964 were $44,473.07. The difference between what Thompson earned and what Anderson earned amounting to $30,730.00 or more than $3,700.00 difference each year. The $30,730.00 represents the difference only to the date of trial. At the time of trial Thompson was 43 years old. Projecting the $3,700.00 per year difference either on the basis of Thompson's life expectancy or until he reached the mandatory retirement age of 70 would amount to an additional sum in excess of $100,000.00, so that the actual verdict of $56,500.00 was reasonable on the basis of the testimony and earning records introduced in evidence. In light of all the evidence, it is neither "shocking" or "excessive". The jury has spoken quite reasonably.

Plaintiff's livelihood was indelibly attached to his chosen career. He must have known the trade as his earnings were responsive. On his seniority, as the jury found, depended his wage. Seniority, job, wages—all were of precious right to him as a laboring man. The jury found his loss of them were attributable to wrongs by defendant.

The verdict of the jury was reasonably and soundly based on testimony and exhibits. The defendant's motion for a new trial or judgment N.O.V. should be denied.

And it is so ordered.

Appendix B

(Opinion of United States Court of Appeals for the Fourth Circuit)

No. 10,251.

FRED THOMPSON,
Appellee,

Versus

BROTHERHOOD OF SLEEPING CAR PORTERS,
an Unincorporated Railroad Labor Organization,
National in Scope,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT FLORENCE.
ROBERT W. HEMPHILL, DISTRICT JUDGE.

(Argued March 9, 1966. Decided September 14, 1966.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF and J. SPENCER BELL, Circuit Judges.

Joseph L. Nettles (Ernest Fleischman, and Delson & Gordon on brief) for Appellant, and Richard G. Dusenbury and Bernard D. Dusenbury (Dusenbury, Dusenbury & McKenzie on brief) for Appellee.

Appendix B—Opinion of United States Court of Appeals for the Fourth Circuit

SOBELOFF, Circuit Judge:

This action for damages against a union for breach of its duty of fair representation came before this court initially on review of a directed verdict in favor of the defendant union, granted at the close of the plaintiff's case. In that posture, after reviewing the complaint and the plaintiff's evidence, we concluded that the plaintiff had stated a cause of action. We held that the union could not be relieved of liability as a matter of law, and held that the evidence raised an issue that should have been resolved by the fact finder after hearing defense testimony. 316 F. 2d 191 (4th Cir. 1963).[1]

On remand, the District Court, sitting with a jury, gave judgment for the plaintiff in the amount of $56,500, representing losses incurred by the plaintiff to the date of judgment and also losses which he will suffer in the future. 243 F. Supp. 261 (E.D.S.C. 1965). On this appeal the union attacks the judgment principally on two grounds: first, that its motion for a judgment *n.o.v.* should have been granted because there is no evidence to support a jury determination of liability; and second, that future damages are not recoverable.[2]

Thompson alleged that because he was not a union member, the Brotherhood of Sleeping Car Porters failed to espouse his claim to mail porter seniority during the years

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[1] The views of this court on the general legal issues were again outlined in Rumbaugh v. Winifrede R. Co., 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). *Cf.* Humphrey v. Moore, 375 U.S. 335, 351 (1964) (Justice Goldberg concurring). See generally, Rosan, *Fair Representation, Contract Breach, and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 Hastings L. J. 391 (1964).

[2] The original briefs filed by the parties were of little aid to the court. At oral argument we requested supplemental briefs which were later submitted to us.

1950 through 1956, and that as a result of this misconduct of the union he lost his job as an employee of the Atlantic Coast Line Railroad Company. We agree with the District Court that there was substantial evidence which, if accepted by the Jury, would warrant recovery. See also *Hiller* v. *Liquor Salesmen's Local No. 2,* 338 F. 2d 778 (2d Cir. 1964); *Gainey* v. *Brotherhood of Railway Clerks,* 230 F. Supp. 678 (E.D. Pa. 1964). Much of the evidence favorable to the plaintiff was narrated by this court in its first opinion, and need only be summarized here.

Thompson was first employed by the railroad in 1946, working off the "extra board" as a mail porter and a train porter. Under the 1944 agreement, then in effect between the Brotherhood and the Railroad,[3] the latter published separate seniority rosters on January 1 of each year for train porters, mail porters, and chair car attendants. The contract provided that the seniority of each employee should begin as of the date of employment in his respective classification, and that changes in seniority rosters would not be made except upon protest filed within 60 calendar days from the date of posting.

On January 1, 1947, Thompson appeared on the *train porter* seniority roster, with seniority dating from January 18, 1946, but his name did not appear on the *mail porter* roster until January 1, 1957, when he was listed as the tenth and last man, with seniority dating from October 22, 1956. Until 1953 or 1954, the train porter's job was preferred by the employees to that of mail porter, but thereafter it became apparent that the company intended to eliminate the train porter classification, and in fact Thompson's position as train porter was abolished in 1956. Because of his junior position on the mail porter list, Thompson was unable to ob-

[3] The agreement did not contain a union shop clause. The subsequent 1954 collective agreement does not differ substantially in any of the provisions here pertinent.

tain any mail porter runs, and in 1957 or 1958 he began to receive unemployment compensation.

In 1950, Thompson protested for the first time the omission of his name from the mail porter seniority list and reiterated his claim with the publication of each successive seniority roster through 1956. His first written protest in which he claimed seniority dating from 1948, was registered in 1953. Thompson concedes that he might not be entitled to seniority as a mail porter before 1950, because of his failure to protest until that year, but contends that the jury could properly have concluded that he was entitled to seniority, if not on the 1950 roster, at least on the 1953 roster. Since Thompson made mail porter runs, as well as train porter runs, from 1950 through 1953, the jury could well have accepted plaintiff's contention that he was entitled to the fourth, if not the third, position on the mail porter seniority roster.[4]

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[4] The Seniority List of Mail Porters as of January 1, 1957, reads as follows:

Name	Date Entered Service	Porter's Seniority
1. A. J. Pringle	5/29/43	10/10/43
2. J. G. Reed	8/15/45	12/18/47
3. R. A. Anderson	11/15/50	11/15/50
4. Amos Maxwell	11/10/52	11/10/52
5. Joe Singletary, Jr.	10/14/55	10/14/55
6. Walter Fulton, Jr.	12/ 6/55	12/ 6/55
7. Charles Andrews	11/ 3/55	4/ 7/56
8. James H. Thomas	8/18/56	8/18/56
9. Mike Curry	9/19/56	9/19/56
10. Fred N. Thompson	10/22/56	10/22/56

Amos Maxwell first appeared on the seniority roster of July 1, 1953, a supplement to the January, 1953, roster, with seniority dating back to November 10, 1952. Because Thompson worked as mail porter during 1952 and protested the omission of his name from the January, 1953, roster, the jury would have been warranted in finding that Thompson should have been listed on the January, 1953, Roster, ahead of Maxwell.

Appendix B—Opinion of United States Court of Appeals for the Fourth Circuit

The union contends that Thompson was not entitled to mail porter seniority during any of the years in question because, as a regular train porter with train porter seniority, he was required to protect his train porter run and could not acquire seniority in both classifications. We, however, agree with the District Court that the jury could take a contrary view. This position is supported by a comparison of the 1953 train porter seniority list with the 1953 mail porter seniority list, which reveals that two employees were accorded seniority in both classifications.[5]

In May and October of 1956, union and company representatives met, with Thompson in attendance, to discuss his status as a mail porter. The company expressed its willingness to list Thompson on the mail porter roster in any position to which the union would agree. The union replied that it would agree to list Thompson with seniority as of 1953, if those employees who had been granted seniority subsequent to 1953 would acquiesce in their being made junior to Thompson. Those employees, naturally, did not acquiesce, and Thompson was listed on the 1957 roster as

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[5] Seniority List of Train Porters—January 1, 1953:

Name	Date Entered Service	Porter's Seniority
1. Mike Curry	2/ 3/33	9/15/42
2. Robert Price	1/ 1/37	12/26/43
3. Glaster Simon	1/ 1/31	9/19/44
4. Fred N. Thompson	1/18/46	1/18/46
5. *J. G. Reed*	8/15/45	12/18/47
6. *R. A. Anderson*	11/15/50	11/15/50

Seniority List of Mail Porters—January 1, 1953:

Name	Date Entered Service	Porter's Seniority
1. A. J. Pringle	5/29/43	10/10/43
2. *J. G. Reed*	8/15/45	12/18/47
3. *R. A. Anderson*	11/15/50	11/15/50
4. Amos Maxwell	11/10/52	11/10/52

having seniority only from October 22, 1956, the date of the October meeting.

Thompson was not a regular, dues-paying union member. He became associated with the union for a brief period sometime in 1951 or 1952, but later withdrew because, as he testified, the union did not vigorously press his claim for seniority. He rejoined the Brotherhood in 1956, at a time when the company was phasing out his train porter position.

Before the 1956 meetings, B. F. McLaurin, International Field Organizer of the Brotherhood, addressed a letter to Thompson, dated May 8, 1956:

> *"I am sure you were aware that there was nothing I could do until you became a full fledged member; now that you have followed through on your responsibility, rest assured that we will do the same at this end.* I have instructed your local chairman to request a formal hearing on your case. I trust that you will cooperate in every way possible to get this case started in order that we may be able to process it into the Railroad." (Emphasis supplied.)

Coupled with the testimony of A. J. Pringle, former Secretary-Treasurer of the Local, that Thompson could not expect the strong support of the Brotherhood unless he were a member in good standing, McLaurin's letter is more than sufficient to require submission of the question of unlawful discrimination to the jury.[6]

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[6] Another revealing letter from McLaurin, dated November 23, 1954, and addressed to all train porters, contains the following language:

> "It is a well-known fact that porters are off their jobs today who ordinarily would be working if they had been members in good standing in the organization."

The union argues that even if it discriminated against Thompson, he still would not be entitled to seniority dating from 1953, because it was not until October, 1956, that he modified his demand for seniority dating from 1948, by substituting the 1953 date as an alternative. We are of the opinion that the evidence permitted a jury finding that the union, possessing complete knowledge of Thompson's position from 1950 through 1956, breached its obligation by not seeking for him in 1953 seniority as of that year, even though Thompson himself then thought that he was entitled to seniority as of 1948. From our reading of the record we also think that it was a jury question whether the union in 1956 should have supported Thompson's claim for seniority as of 1953, despite the fact that other employees on the mail porter seniority list—even members of the union—would thereby have become junior to Thompson.

II

We turn now to the award of damages. Of the $56,500 that the jury awarded, the District Court determined, upon an analysis of the evidence which appears to be well supported, that $30,730 represented compensation to the plaintiff for losses in income from the end of 1956, when Thompson's train porter job was eliminated, to December, 1964, the date of the verdict.

The court reasoned that if Thompson had been fairly represented by the union he would have made runs substantially similar to those made by R. A. Anderson, who is third on the 1957 seniority list for mail porters. During the period from 1957 through 1964, Anderson earned a total of $44,473.07, while Thompson's earnings during the same period amounted to only $13,743, $30,730.07 less than Anderson's. We think that it was within the lawful discretion of the jury to use the comparison between Thompson's and

Anderson's earnings to arrive at Thompson's loss of wages, and that $30,730 is not an unreasonable figure as the measure of past damages.

In affirming the total amount of the jury's verdict, the court said:

> "At the time of trial Thompson was 43 years old. Projecting the $3,700.00 per year difference either on the basis of Thompson's life expectancy or until he reached the mandatory retirement age of 70 would amount to an additional sum in excess of $100,000.00, so that the actual verdict of $56,500.00 was reasonable on the basis of the testimony and earning records introduced in evidence." 243 F. Supp. at 275.

Thus, $25,770 was judged a reasonable measure of Thompson's future losses.[7]

We are of the opinion that the District Court did not abuse its discretion in refusing to set aside the jury's verdict. Appellant objects to the allowance of any damages for future losses on the ground that they are too speculative. The propriety of an award for future losses, however, is implicit in the decisions of the Supreme Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964) and *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1956). *Wiley* establishes that seniority rights do not necessarily terminate at the expiration of the collective bargaining agreement.

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[7] The Complaint did not request punitive damages, and the District Judge's charge to the jury specifically limited its consideration to compensatory damages: "The only question of damages in this case is a question of what is known as actual damages and actual damages are compensatory damages. That is what he lost or what he suffered." 243 F. Supp at 266. *Cf.* Brady v. Trans World Airlines, Inc., 196 F. Supp. 504, 506 (D. Del. 1961); 223 F. Supp. 361, 370 (D. Del. 1963).

Lincoln Mills mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations. Since neither the plaintiff nor the defendant saw fit to make the railroad a party to this action, the only effective remedy is a damage award for the loss of past and future earnings. Although Thompson's loss of future earnings cannot be established with absolute precision, we agree with the District Court's conclusion that the jury's verdict provides a reasonably accurate measure and appears to have taken into account factors which might operate in mitigation of the loss. An injured party is not barred from a reasonable recovery merely because he is unable to prove his damages with absolute certainty. See *Zdanok* v. *Glidden Co.*, 288 F. 2d 99, 104 (2d Cir. 1961), *aff'd*, 370 U.S. 530 (1962). Moreover, no issue as to the amount awarded for future losses has been raised in the briefs, oral arguments or supplemental memoranda, and upon consideration of the entire case we find no basis for disturbing the judgment.

Affirmed.

APPENDIX C

(Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,251

FRED THOMPSON,

Appellee,

vs.

BROTHERHOOD OF SLEEPING CAR PORTERS, an Unincorporated Railroad Labor Organization, National in Scope,

Appellant.

Appeal from the United States District Court for the Eastern District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

SIMON E. SOBELOFF,
United States Circuit Judge.

Filed
Sept 14 1966

Maurice S. Dean
Clerk

SUPREME COURT, U. S.
JAN 9 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 860

BROTHERHOOD OF SLEEPING CAR PORTERS,
PETITIONER,

versus

FRED THOMPSON, RESPONDENT

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1966

No. ....

BROTHERHOOD OF SLEEPING CAR PORTERS,
PETITIONER,

versus

FRED THOMPSON, RESPONDENT

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT

Thompson went to work for the railroad in 1946 as a porter. During each and every year thereafter until the year 1956 when he finally prevailed upon the defendant to secure him a hearing, he made runs as a mail porter and as a train porter. He was never given his seniority as a mail porter until 1956, despite protests made each and every year commencing in 1950 and continuing through 1956.

Porters are not hired into a "regular" assignment but instead worked off of an "extra" board standing for extra runs in order of seniority. Thompson did not receive a "regular" assignment until 1953. That is, if, as was the case, there were four regular train runs every day and there were six men on the roster, only the top four men in seniority would be assured of regular employment, and the rest would have to stand for "extra" or "non-regular" runs off of the extra board.

Both the 1944 Agreement and the 1954 collective bargaining agreement between the Atlantic Coast Line Railroad and defendant union permitted a given employee the right to establish seniority on both the train porters roster and the mail porters roster. For an illustration of how this worked, see the 1953 and 1957 mail and train porters seniority rosters. In 1953 Reed and Anderson had seniority on both rosters, and in 1957 Curry, Reed, Thompson, Anderson, Singletary, Maxwell and Andrews had seniority on both rosters.

The 1944 Agreement, Rule 2 (c), provided: "Separate seniority rosters will be prepared for each classification . . . Seniority of each employee shall begin as of the date of employment in his respective classification . . ." Rule 4 of the 1944 Agreement provided: "Mail porters promoted to the position of train porter will retain seniority as mail porter, and when displaced as train porters in reduction of forces, will be privileged to displace mail porters their junior in service as mail porters, and will retain their seniority as train porters . . ."

The 1954 Agreement contained essentially the same seniority provisions except that their operation was spelled out in more detail. Both agreements provided that the rosters would be "posted" in January of each year. This was never done. Protest of any roster had to be made "within 60 calendar days of the date of posting." Thomp-

son began protesting in 1950. He also protested in 1951, 1952, 1953, 1954, 1955 and 1956. Between the time Thompson began protesting and 1956 when action was finally taken eight porters junior in point of service to Thompson were given seniority as mail porters ahead of Thompson and six of the eight were also given seniority as train porters. Four of the six who were given seniority as both train and mail porters had their dual seniority conferred before the 1954 Agreement was executed.

Thompson testified and produced cumulative correspondence from union officials to the effect that they refused to help him establish his seniority because he was not a member of the union. In 1957 Thompson was finally designated as the tenth and last man on the roster, and in the last two years thereafter that he remained on the roster he was never called for work. The difference in being number two and number ten was tantamount to a complete loss of seniority or discharge. The only other regular employment Thompson was able to obtain was as a janitor. He is still employed as a janitor.

In paragraph 3 of the prayer of the complaint (as amended) plaintiff asked that the Court "Award plaintiff actual damages in the amount of $200,000.00 for damages that have accrued to date and that will accrue in the future."

REASONS FOR OPPOSING THE WRIT

1. The decision of the Court of Appeals does not cast any new or unreasonable burden on the union.

Petitioner's argument in support of granting the Writ is that the Circuit Court's decision unduly restricts the Union in the exercise of its right to exercise reasonable discretion in handling employee grievances. Petitioner says that the Circuit Court "unduly restricts" and "penalizes"

when it "affirms the imposition of liability simply because there is reasonable ground for a jury to have come to a decision as to Respondent's claim different from that at which the bargaining agent arrived" and in support of this argument quotes from the opinion of Judge Sobeloff below: "From our reading of the record we also think that it was a jury question whether the union in 1956 should have supported Thompson's claim for seniority as of 1953 . . ."

Judge Sobeloff wrote the opinion for the Circuit Court in both appeals below, and his own words show that the Fourth Circuit does not impose on a collective bargaining representative the "intolerable" risk and burden suggested by petitioner. Judge Sobeloff correctly stated the rule in his first opinion (316 F. (2d) 191, 4th Cir. 1963):

"But, any discrimination in treatment must be based upon relevant, non-invidious distinction for, while '(a) wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, (it is) subject always to complete good faith and honesty of purpose in the exercise of its discretion.'"

This Court in *Humphrey v. Moore,* 375 U. S. 335, 11 L. Ed. (2d) 370, 84 S. Ct. 363, has indicated the guidelines applicable to cases involving alleged breaches of the duty of fair representation:

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman,* 345 U. S. 330 at 338, 97 L. Ed. at 1058.

The charge of the trial judge in the District Court below gave strong emphasis to this considerable latitude given the union in handling grievances. Here are relevant extracts from Judge Hemphill's charge (emphasis mine):

"I charge you that the duty of fair representation of the Brotherhood to Train and Mail Porter—the Defendant asked me to charge you this—covered, likewise requires fair representation to others—of all, and the Brotherhood could not arbitrarily displace a senior with one junior." (P. 599, Tr.)

"I charge you that the Brotherhood is not obliged to adopt any individual's interpretation of the Bargaining Agreement and the rights thereunder, at his request. **It must exercise its own fair judgment,** subject to the requirement that it forbear from hostile discrimination against any person; that is, the Brotherhood must not act against any person from malice.

"I charge you that in order for the Plaintiff to recover, he must first prove that there was merit in his claim to mail porter seniority. If he was in fact not entitled to it, then he cannot complain because he was not given it and whether the Defendant represented him fairly or unfairly in his claim is immaterial except that I charge you in that connection: **It is a question of reasoning, a question of reasonableness, a question of good faith and honesty.** Did the Plaintiff show that he received different or substantially substandard representation at the hands of the Defendant? If so, was it because of some improper reason such as his unsatisfacory union status? Did this treatment cause him injury? (P. 601, Tr.)

"I charge you, that fair representation—the Defendant asked me to charge this—does not require that the Brotherhood agitate endlessly at the instance of any employee who may consider himself aggrieved. **The Defendant has a wide range of discretion within which to decide whether or how far a particular claim warrants prosecution.** I therefore charge you that if the Brotherhood was acting in good faith in concluding that the Collective Bargaining Agreement relating to seniority did not require the railroad to put Plaintiff on the Mail Porters' seniority roster with seniority date earlier than 1956, the Plaintiff cannot recover." (P. 601, Tr.)

In Judge Sobeloff's second opinion (the subject of this petition for a writ), he cites *Humphrey v. Moore* as authority. In his first opinion, Judge Sobeloff took counsel for both parties to task because "There (was) no adequate discussion of the considerable body of law relating to the federal cause of action for breach of a union's duty of fair representation." *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F. (2d) 191 at 197.

The delicts of the Union in this case were shocking. The Union did not even bother to try to conceal the motive for its hostile discrimination. B. F. McLaurin, Eastern Zone Organizer and Defendant's chief witness was explicit as to the reason the Union did not help the Plaintiff—he was not a member of the Union, and he was one of the "dissident" non-union employees. The Plaintiff proved his case with a "trunkful" of documents, letters, memoranda, and exhibits. The testimony of A. J. Pringle, Local Chairman, and the cross examination of Joe Green, former local chairman, explicitly established the fact of discrimination, as well as the invidious, non-relevant motive for it—non-union status. The Union never did during either trial nor on either appeal explain why other porters were given their seniority and the Plaintiff was not.

Judge Sobeloff summarized Plaintiff's proof that required submission of the question of unlawful discrimination to the jury (Page 46 of Petition):

Thompson was not a regular, dues-paying union member. He became associated with the union for a brief period sometime in 1951 or 1952, but later withdrew because, as he testified, the union did not vigorously press his claim for seniority. He rejoined the Brotherhood in 1956, at a time when the company was phasing out his train porter position.

Before the 1956 meetings, B. F. McLaurin, International Field Organizer of the Brotherhood, addressed a letter to Thompson, dated May 8, 1956:

> "I am sure you were aware that there was nothing I could do until you became a full fledged member; now that you have followed through on your responsibility, rest assured that we will do the same at this end. I have instructed your local chairman to request a formal hearing on your case. I trust that you will cooperate in every way possible to get this case started in order that we may be able to process it into the Railroad." (Emphasis supplied.)

Coupled with the testimony of A. J. Pringle, former Secretary-Treasurer of the Local, that Thompson could not expect the strong support of the Brotherhood unless he were a member in good standing, McLaurin's letter is more than sufficient to require submission of the question of unlawful discrimination to the jury.*

The Fourth Circuit Court of Appeals has enunciated no principles in either opinion contrary to the rules laid down in this field by this Court. Both the charge of the trial judge and the opinions of Fourth Circuit are well inside the circumferential ambit of the *Humphrey v. Moore* guidelines.

2. The Decision of the Court of Appeals is not in conflict with the applicable decisions of this Court.

This Negro porter had certain rights that were not protected. He sued the Union malefactor and did not elect to join the railroad; nor did the Defendant elect to join the railroad. Plaintiff prayed for future damages because

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* Another revealing letter from McLaurin, dated November 23, 1954, and addressed to all train porters, contains the following language:

> "It is a well-known fact that porters are off their jobs today who ordinarily would be working if they had been members in good standing in the organization."

his whole career—the only one really available to him at this wage level—had been maliciously destroyed by the Defendant union. The judge charged future damages, and the jury brought in a verdict for substantial damages, including future damages. Defendant has not questioned the amount of the award but argues that our decisions do not permit an award of damages beyond the date of the final judgment.

In *Wicker v. Hoppock,* 73 U. S. (6 Wall.) 94, 18 L. Ed. 752, this Court stated the foundation rule of damages: "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury."

However, until recently, practically everyone, including the courts and especially the commentators, concluded that labor relations law was a very special creature of statute. Majority rule and rights were the order of the day. The individual employee became the acknowledged sacrifice to this concept. The commentators agonized in law review article after law review article over the plight of the individual under old case law and modern labor statutes and generally concluded that the individual has very few rights except insofar as he comprises a part of the mass; anyway he has few court recognized remedies for violated rights in this area and the courts have had to find new bottles for new wine—the new wine being those decisions securing certain rights to the individual employee. *Steele v. Louisville & N. R. R.,* 323 U. S. 192 (1944), decreed the duty of fair representation. *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448 (1956), mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations. *John Wiley & Sons v. Livingston,* 376 U. S. 543 (1964), establishes that seniority rights do not necessarily termi-

nate at the expiration of the collective bargaining agreement.

The following cases are spiritual predecessors if not legal precedents affirming the proposition that the courts under proper circumstances will secure rights and provide effective remedies therefor extending beyond the term of the agreement from which those rights derive: *Zdanok v. Glidden Co.*, 288 F. (2d) 99, 99 A. L. R. (2d) 965, affirmed 370 U. S. 530, 8 L. Ed. 671; *Giordano v. Mack Trucks, Inc.*, 203 F. Supp. 905 (D. N. J. 1962); *Piano and Musical Instrument Workers Union Local 2549 v. W. W. Kimball Co.*, 221 F. Supp. 461 (N. D. Ill. 1963); *United Shoe Workers v. Brooks Shoe Manufacturing Co.*, 187 F. Supp. 509 (E. D. Pa. 1960); and *Wiley & Sons v. Livingston, supra.*

The decisions just cited, as well as the decision in this case, confirm that the lower courts are actively engaged in process of interfusing statute-weighted labor relations law with rights-conscious Anglo-American jurisprudence. No court or body is more aware than this Court that labor relations law has, so far as the individual employee is concerned, constituted a frustration for the individual and a dilemma for the courts. This decision is a true legal and equitable descendant of *Lincoln Mills* and *Steele v. Louisville & N. R. R.* This case and the others like it are steadily removing the hiatus in the law as it relates to the rights of the individual employee. The elan vital of the labor relations statutes will not be destroyed by decisions like this extending time-honored legal remedies to this heretofore barren area of labor relations law. This case accords with the vital considerations of this Court as expressed in *Humphrey v. Moore.* No judge or right-minded person is against providing remedies where there are rights—if those remedies are not of such a nature that they threaten some absolutely vital process in our social order, such as the collective bargaining process in labor relations, but even

the most cursory analysis discloses that the spectre of industrial strife does not hang over (litigation) of individual complaints where the controversy is solely between the individual and his malfeasant representative and does not bring the two giants themselves into conflict.

Why is it important that this case be let live? This case stands for the proposition that a union will have to represent all of its members on a non-discriminatory basis or expose itself to an action for damages in which the measure of damages is coextensive with the injury inflicted. Neither the Plaintiff nor the Brotherhood saw fit to join the Company-employer, and significantly there was not the slightest impact on relations between the Union and the Company-employer as a result of this case.

A careful reading of the record will confirm that this verdict is what this representative needs to make it act responsibly.

Sanford J. Rosen, writing in Vol. 15, page 391, Hastings Law Journal, "Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining", points out that "in reality, unions are now themselves being sued by individuals with no apparent crippling effect to their treasuries or to their general usefulness to the workers. (Footnote 173, *ibid.*: In 1957 the income of labor unions in the United States reached about $620,000,000. 187 Economist 703 (1958).)

In this article, Mr. Rosen points up the scant protection afforded the individual employee under the judicial process (Quoting, page 399, May 1964):

> "While it is now clear that labor unions, and consequently union officers and officials, owe those whom they represent a fiduciary duty of fair representation, unfortunately the protection afforded is less than apparent. (Citations.)

"Initially, there are limitations inherent in the judicial character of the protection. To gain relief an expensive law suit must be conducted—this usually out of the question for all but especially outraged workers. (Citations.) Such a law suit, in addition, is likely to be so time consuming as to dissipate real enjoyment of the fruits of any ultimate victory. (Here in footnote 39, the author cites a quote from the opinion of Judge Sobeloff in the instant case—315 F. 2d, 192 n. 1):

" 'We note the unhappy fact that the litigation was begun more than four years ago, etc.' (It has now been more than eight years since this litigation was begun.) (Continuing the Rosen article): In addition, a number of courts have compounded the general limitations incident to the judicial character of the remedy by imposing 'numerous procedural and technical barriers which tend to restrict effective protection of employees.' (Citations.) The effect of these limitations is quite significant. A commentator who communicated with the attorneys of record, in the reported fair representation cases involving alleged racial discrimination, as to the present status or ultimate disposition of each case has concluded that:

> "In theory, the doctrine of fair representation assures Negroes that their jobs cannot be affected by unfairness on the part of their collective bargaining representatives. In fact, Negro workers have made extremely limited use of judicial coercion under the *Steele* standard; and when they have tried to take advantage of its apparent protection, they have secured only slight practical amelioration of their position."

"In non-racial cases, effective use of the judicial protection appears to be even more limited. As already noted, some courts were initially reluctant to extend the duty to cases other than those involving racial affronts. By now, however, it is clear that the obligation does extend to non-racial abuses of union power. (Citations.) Yes, in only a very few cases have ag-

grieved parties won court decisions on the merits when unfair representation of a non-racial origin has been alleged. (Citations.)

"The judicial tendency to circumscribe availability of the remedy and the reluctance to extend the duty to prohibit non-racial injuries reflects a continuation of the general judicial attitude against intervention in the sphere of private associational power and organization. Criticism has been leveled at the courts for being unwilling 'to discard the doctrine of non-interference in the internal affairs of "voluntary organizations" even in applying the explicit statutory protection of Title I, "The Bill of Rights" provisions, of the Labor Management Reporting and Disclosure Act of 1959'." (Citations.)

If *Lincoln Mills* is to have continuing vitality judicial inventiveness must be given a chance. This decision should be let stand for the present in any event. It is, under its special facts, an expansion of remedy for the individual employee. Certainly, in this arid area of the law this one little bloom should not be stamped out aborning. Decisions have been few and far between in this area and to deny this one at least the tentative or temporary sufferance promised in *Lincoln Mills* would inhibit further judicial inventiveness in this area. It would appear that when as now the courts have fashioned an expanded remedy in this area of labor relations law, this Court should hesitate to even note its existence until it has had an opportunity in its own good time to prove whether it is a sport or a firmly implanted seedling that along with other decisions in this area will expand legal remedies available to employees and will promote increased responsibility on the part of bargaining agreement representatives.

Again it is emphasized that a suit for money damages in which the employee is pitted solely against his alleged delinquent representative cannot when so separated from

the vital bargaining process itself disrupt or impede the bargaining process. The decisions of the courts has reflected the concern of everyone for the health of the bargaining process which must be promoted and protected until it has achieved optimum stability, maturity, and flexibility, but this case itself is good evidence that the employee can still be protected and provided a plenary remedy without in any degree creating discord between the Union and management.

This case is in accord with the lines of authority and principles laid down in the *Steele, Lincoln Mills, Humphrey v. Moore, Zdanok v. Glidden* and *Wiley v. Livingston* cases above. Therefore, the Writ should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 860

BROTHERHOOD OF SLEEPING CAR PORTERS, *Petitioner*,

v.

FRED THOMPSON, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI AND ANNEXED BRIEF

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MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI, AND ANNEXED BRIEF

The Railway Labor Executives' Association hereby respectfully moves the Court for leave to file the annexed brief as *amicus curiae* in support of the petition for certiorari filed by the Brotherhood of Sleeping Car Porters. Consent of the petitioner for the Association to participate *amicus curiae* has been obtained; the consent of counsel for respondent was requested but refused.

INTEREST OF THE ASSOCIATION

The Railway Labor Executives' Association on whose behalf this brief as *amicus curiae* is sought to be filed is a voluntary unincorporated association located in Washington, D. C., comprised of the chief executive officers of each of the following standard national and international railway labor organizations:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employees and Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
Transportation-Communication Employees Union

The foregoing organizations affiliated with the Railway Labor Executives' Association (RLEA or Association) represent, for collective bargaining purposes under the Railway Labor Act, the bulk of the nation's rail employees, and this Court has recognized the Association as a proper party to appear and speak for these affiliated organizations and their railroad employee members. *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373; *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142; *American Trucking Associations, Inc., et al.* v. *United States,* 355 U.S. 141.

Each of these organizations is a party to collective bargaining agreements with nearly every railroad in the United States governing the rates of pay, rules, and working conditions of the craft or class of employees which it represents. Said organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application.

Under the decision below the Brotherhood of Sleeping Car Porters, undertaking to fairly represent a railroad employee performing duties within the craft of employees it represents, and exercising its duty to fairly interpret provisions of a collective bargaining agreement setting forth the rules and working conditions governing such employees, is charged with having exercised *hostile discrimination* toward the respondent because of its failure to prosecute with the employee's railroad employer a grievance as to which it believed there was no merit, and has been assessed damages computed not only on the basis of an estimate of back wages purportedly unlawfully denied respondent but

which include *future* damages calculated in accordance with a state mortality table.

The questions presented by the appeal in this case are of the utmost importance to the Association, the individual organizations affiliated with it, and the thousands of railroad employees who have chosen such organizations as their collective bargaining representatives under the Railway Labor Act. The extent to which these organizations can continue to fulfill their foregoing statutory duties and functions and the procedures to which they must resort to do so are directly and vitally involved in the issues in this case. The issues in this case thus are of great concern to the *amicus curiae* and their proper resolution by this Court is a matter of the highest importance, not merely to the petitioner organization but to railroad labor as a whole.

Wherefore, the Association moves the Court for leave to file the brief annexed hereto in support of the petition for certiorari.

Respectfully submitted,

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition of the Brotherhood of Sleeping Car Porters.

Briefly stated this case shows that the respondent, a railway employee acquiring seniority as a *train* porter by reason of his assignment in 1948 to a regular job in that classification, sought in 1952 to have his employer grant him a seniority date of 1948 in the classification of *mail* porter. The employing railroad refused

to consider the request. Respondent thereafter sought the assistance of petitioner, culminating in his being given a *mail* porter's seniority date of 1956.

The opinion of the Court of Appeals describes the evidence of record (Pet., p. 44) as showing that respondent protested without success at various times during the period 1950-1956 his failure to obtain a seniority date as mail porter. The Court stated that "the evidence permitted a jury finding that the union, possessing complete knowledge of Thompson's position from 1950 through 1956, breached its obligation by not seeking for him in 1953 seniority as of that year, even though Thompson himself then thought he was entitled to seniority as of 1948" (Pet., p. 47).

The case was before the District Court on remand from a prior decision and judgment of the Fourth Circuit, 316 F.2d 191 (C.A. 4th, 1963), for resolution of the question of whether the conduct of petitioner constituted (243 F. Supp. 261, 263):

> "invidious discrimination", "reasonableness", "good faith and honesty": Did the plaintiff show that he received different or substantially substandard representation at the hands of the Brotherhood? If so, was it because of some improper reason, such as his unsatisfactory union status? Did this treatment cause him injury? If the answers of the trier of fact to the three questions are in the affirmative, the plaintiff is entitled to relief.

There was thus a series of qualitative questions before the District Court presenting inquiries to be answered in measurement against the standard of fair and reasonable representation, imposed by law upon petitioner, and in measurement against the conduct of

petitioner towards others similarly situated as respondent to whom petitioner owed the same statutory duty. The petition herein shows that the decision sought to be reviewed does not disclose that the controversy was resolved in accordance with the prior direction of the Court of Appeals and as such is contrary to relevant principles of law enunciated by this Court.

INTEREST OF THE ASSOCIATION

The interest of the Association is set forth in the annexed motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

1. The decision and judgment of the Court of Appeals discloses that the conduct of petitioner has not been tested fairly by the statutory standard of fair representation imposed on it.

The prior opinion of the Court of Appeals at 316 F.2d 191, 197-200, set forth fully, with citation of substantial judicial precedents, the duty of fair representation owed by a collective bargaining agent to the members of the class of employees it represented. Nowhere in its discussion of that duty does the Court of Appeals deny the proposition that a collective bargaining agent is permitted to act in accordance with its judgment and discretion so long as its actions are fair and uniform in all similar situations. While petitioner reasonably may be found to have failed to press with respondent's railroad employer a grievance which petitioner believed to be meritless, a judgment shared in by the railroad, petitioner cannot on that basis properly be found to have exercised "invidious discrimination", "unreasonableness", and the lack of "good faith and honesty."

As the Court said in *Humphrey* v. *Moore,* 375 U.S. 335, 349-350:

> . . . we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. In *Ford Motor Co.* v. *Huffman,* 345 US 330, 97 L ed 1048, 73 S Ct 681, the Court found no breach of duty by the union in agreeing to an amendment of an existing collective bargaining contract, granting enhanced seniority to a particular group of employees and resulting in layoffs which otherwise would not have occurred. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id., 345 US at 338, 97 L Ed at 1058. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

In substance, it will be found that the judgment below rests substantially on conduct attributed to a *Field Organizer* of petitioner whose duties and interests did

not relate to contract grievance matters but did relate to union membership solicitation, and on the fact that certain other porters employed by the railroad obtained seniority dates in advance of the respondent. While showing correctly that the collective bargaining agreement provided that porters *employed initially as mail porters* would obtain seniority on the mail porter roster, and retain it if later they were promoted to regular jobs as *train* porters at which time they would acquire also seniority on the train porter roster, the courts below indulge themselves the fiction that the reverse was true. That the contracts do not so provide is clearly shown by the marginal notes to the Circuit Court's opinion (316 F.2d 191, 193-194, note 4). Such progressions from mail porter to train porter easily explain, as the testimony before the District Court shows, why certain employees were listed on both rosters, a fact which apparently disturbed both courts below, and which fact was obviously but unwarrantedly relied upon to show dissimilar or discriminatory treatment of employees similarly situated as respondent.

In the same superficial manner, the court below accepts the proposition that petitioner's attempted but unsuccessful effort to settle respondent's grievance unfairly prejudiced respondent, and amounted to hostile discrimination. It is obvious that such a charge cannot be made in the absence of a showing that petitioner acted or would have acted otherwise as concerned other employees similarly situated as respondent. The record is devoid of any tangible evidence to warrant such a conclusion albeit required for the judgments reached by the lower courts.

2. The decision and judgment of the Court of Appeals sustaining an award of *future* damages to

respondent erroneously approves of a misinterpretation of recent rulings of this Court. Reliance by the lower courts on the decisions of this Court in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, and *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, as a basis for inclusion of future damages measured by past earnings of other employees and the *possibility* that the respondent may live to a required retirement date, is clearly error. The cited decisions to the extent relevant here require only recognition by the federal courts that certain rights of employees accruing under an existing agreement may be asserted, in particular circumstances, against an employer succeeding the company with which the agreement was negotiated (*Wiley*), and that the federal courts are charged with the duty of applying federal law "fashioned from the policy of our national labor laws" in resolution of labor relations controversies affecting interstate commerce (*Lincoln Mills*). These decisions do not warrant the federal courts' *creation* of new benefits for employees not found in their collective bargaining agreements with their employers. *United Steelworkers* v. *Enterprise Corporation,* 363 U.S. 593, *cf. Louisville and Nashville R. Co.* v. *Brown,* 252 F. 2d 149, 155. Yet, the lower courts rely upon the seniority provisions of the contract to justify the assessment of damages both past and in the future. Comparative seniority may reasonably be construed to furnish a basis for determining past earnings unlawfully withheld, but seniority cannot be used synonymously as job tenure upon which to calculate future wage earnings. No substantial legal authority was relied upon by the courts below to warrant the imposition of future damages calculated on conjecture and having no legal justification in the collective bargaining agreement or under the Railway

Labor Act. Particularly is such action unjust when it is noted that respondent prior to commencement of the action below voluntarily left the employ of the railroad (Pet., p. 4) and was therefore personally chargeable with any injury to flow therefrom. If restitution to a position with a proper seniority date and the past and future earnings to result therefrom was the measure of relief that respondent desired and thought he was lawfully entitled to receive, he had a complete remedy available to him by resort to statutory administrative remedies under the Railway Labor Act. *Walker* v. *Southern Railway Company,* No. 89, Oct. Term 1966, decided December 5, 1966.

The judgment and decision of the Court of Appeals, dependent as it is for its validity upon a jury's evaluation of the legal significance of technical contract provisions, and the statutory duty imposed on a collective bargaining representative by the Railway Labor Act, an evaluation made by a body inexpert in the "railroad world", "a state within a state" having "its own customs and its own vocabulary", and living "according to rules of its own making", *Whitehouse* v. *Illinois Central R. Co.,* 349 U.S. 366, 371, is hardly the vehicle upon which to justify such an incursion into the established field of railway labor jurisprudence.

The decision below, if allowed to stand, can be expected to prevent the exercise of expert judgment and discretion admittedly required of a collective bargaining agent to "sift out" the meritorious from the frivolous claims, *Humphrey* v. *Moore, supra,* and threatens substantially to eliminate the "wide range of reasonableness" permitted of collective bargaining agents, and to unfairly penalize them and the employees they represent for simply disagreeing with the

soundness of a claim advanced by one of the class it represents.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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